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Balancing Act in Black Robes: Extraterritorial Habeas Corpus Jurisdiction beyond *Boumediene*

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I. INTRODUCTION

In June 2008, the Supreme Court of the United States decided *Boumediene v. Bush*,[1] giving alien terrorist suspects detained at Guantanamo Bay the constitutional right to seek habeas corpus[2] relief in federal courts.[3] Zigzagging its way through a millennium of legal history and precedent to the contrary, the Court held that its jurisdiction to issue the writ of habeas corpus could reach outside the sovereign territory of the United States and that the Constitution compelled the writ's extension to Guantanamo detainees.[4] In arriving at this conclusion, the Court fashioned a three-part balancing test to determine under what circumstances the writ would reach outside the United States.[5] With this balancing test, the *Boumediene* Court bequeathed a blank check to the lower courts to extend the writ beyond Guantanamo to "the four corners

1. 128 S. Ct. 2229 (2008).

2. Habeas corpus is "[a] writ employed to bring a person before a court, most frequently to ensure that the person's imprisonment or detention is not illegal." BLACK'S LAW DICTIONARY 778 (9th ed. 2009). The writ of habeas corpus is protected by the Suspension Clause of the United States Constitution, which provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2.

3. Boumediene v. Bush, 128 S. Ct. 2229, 2262 (2008).

4. *See* James Thornburg, Recent Decision, *Aliens Detained at Guantanamo Bay Have a Constitutional Right to File Habeas Corpus Petitions in Federal Court:* Boumediene v. Bush, 47 DUQ. L. REV. 179 (2009).

5. *See Boumediene*, 128 S. Ct. at 2259.

of the earth."[6] In April 2009, with his decision in *Al Maqaleh v. Gates*,[7] Judge John D. Bates[8] cashed that check and bought a ticket to Bagram Airfield in Afghanistan, an active theater of war. With his extension of the writ to enemy combatants detained in Afghanistan, Judge Bates demonstrated the utter manipulability of the *Boumediene* test and revealed the extent to which the *Boumediene* Court's ill-considered decision subjects our nation's warfighting ability to the whims of life-tenured, unelected, politically unaccountable lawyers in black robes.

This comment will examine Judge Bates's application of *Boumediene* in *Maqaleh*. First, it will provide a brief overview of the creation of the balancing test in *Boumediene* and its application in *Maqaleh*. Next, the comment will analyze Judge Bates's application of the test, arguing that he misunderstood or improperly weighed relevant factors and relied on considerations never mentioned by the *Boumediene* Court. Finally, the comment will maintain that Judge Bates's misadventure confirms that *Boumediene* created a poor framework for determining the extraterritorial reach of the writ of habeas corpus.

II. BACKGROUND

A. *The* Boumediene *Test*

The *Boumediene* Court identified three factors relevant to determining whether the writ of habeas corpus extends to detainees outside the sovereign territory of the United States: "(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ."[9] In applying these factors, the Court often compared the situation of the Guantanamo detainees to that of

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6. Rasul v. Bush, 542 U.S. 466, 498 (2004) (Scalia, J., dissenting) (noting that abandonment of territorial sovereignty as the test for the reach of the writ will result in habeas jurisdiction without limits), *superseded by statute,* Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005, 119 Stat. 2680, 2740-44 (amending 28 U.S.C. § 2241 (2006)) and Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635-36 (amending 28 U.S.C. § 2241 (2006)).

7. 604 F. Supp. 2d 205 (D.D.C. 2009).

8. Judge Bates was appointed to the United States District Court for the District of Columbia by President George W. Bush in December 2001. Judge John D. Bates, http://www.dcd.uscourts.gov/bates-bio.html (last visited Jan. 13, 2010).

9. *Boumediene*, 128 S. Ct. at 2259.

the German detainees in *Johnson v. Eisentrager*,[10] a 1950 case in which the Court held that the writ did not extend to enemy aliens convicted of violating the laws of war and detained by American forces at Landsberg Prison during the Allied Powers' occupation of Germany after the Second World War.[11] The *Boumediene* Court distinguished *Eisentrager* and held that, though the writ did not extend to the *Eisentrager* detainees, it could extend to the Guantanamo detainees.[12] This distinction would later become critical in *Maqaleh*, as the dividing line for whether the writ extended in a given case must lay somewhere between the situations presented in *Boumediene* and *Eisentrager*.

Applying the first factor of its test, the *Boumediene* Court found: (1) that the detainees were not American citizens; (2) that their status was in dispute because they denied that they were enemy combatants; and (3) that the process through which their status determination was made was inadequate.[13] The Court noted that the *Eisentrager* detainees also were not American citizens, but that they apparently had not contested their status as enemy aliens.[14] The legal process for determining that status in *Eisentrager*, the *Boumediene* Court pointed out, was much more extensive than the process received by the Guantanamo detainees.[15] While the *Eisentrager* detainees underwent "a rigorous adversarial process to test the legality of their detention," the Guantanamo detainees received procedural protections that "f[e]ll well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review."[16]

The *Boumediene* Court conceded that the detainees failed to meet the second factor of the test because the sites of their apprehension and detention were "technically outside the sovereign territory of the United States," and that this factor thus "weigh[ed] against finding" that the writ extended to the detainees.[17] However, the Court implied that the site of detention had weighed more heavily against the *Eisentrager* detainees, as the United States' control over Guantanamo was "absolute and indefinite," but its control over Landsberg Prison in Germany had been "tran-

10. 339 U.S. 763 (1950).
11. *Eisentrager*, 339 U.S. at 765-66.
12. *Boumediene*, 128 S. Ct. at 2259-62.
13. *Id.* at 2259-60.
14. *Id.* at 2259.
15. *Id.* at 2259-60.
16. *Id.*
17. *Boumediene*, 128 S. Ct. at 2260.

sient" and the United States had been "answerable to its Allies for all activities occurring there."[18] The *Boumediene* Court concluded that the United States had de facto sovereignty over Guantanamo and that "[i]n every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States."[19]

For the third factor, the *Boumediene* Court found "few" practical obstacles and noted that the "Government present[ed] no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims."[20] The Court contrasted this lack of practical obstacles with what it saw as substantial practical obstacles existing in *Eisentrager*.[21] It pointed out that American forces in post-war Germany were "responsible for an occupation zone encompassing over 57,000 square miles with a population of 18 million," supervised "massive reconstruction and aid efforts," and "faced potential security threats."[22] The *Boumediene* Court also stated that the *Eisentrager* Court "was right to be concerned about judicial interference with the military's efforts to contain enemy elements, guerilla fighters, and 'were-wolves.'"[23] Such obstacles did not exist at Guantanamo, the *Boumediene* Court reasoned, as it was an isolated area of only forty-five square miles occupied exclusively by U.S. personnel, the detainees, and "a small number of workers."[24] The Court also stated that if Guantanamo "were located in an active theater of war, arguments that issuing the writ would be 'impracticable or anomalous' would have more weight."[25]

After analyzing each of the three factors, the *Boumediene* Court proceeded to hold that the writ extended to the Guantanamo detainees.[26] Though the majority opinion totaled almost forty pages,[27] only about three were devoted to the formulation and application of the test.[28] The *Boumediene* Court's brief analysis of

18. *Id.* at 2260-61.
19. *Id.* at 2261.
20. *Id.* at 2261-62. It seems, however, that the Government did not attempt to argue that any practical obstacles would prevent the writ's extension to Guantanamo, ostensibly because nothing in the history or precedent existing before *Boumediene* indicated that such a factor would be relevant. *See* Brief for the Respondents, Boumediene v. Bush, 128 S. Ct. 2229 (2008) (Nos. 06-1195 and 06-1196), 2007 WL 2972541.
21. *Boumediene*, 128 S. Ct. at 2261.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 2261-62.
26. *Boumediene*, 128 S. Ct. at 2262.
27. *See id.* at 2240-77.
28. *See id.* at 2259-62.

the test it created would provide little guidance to those applying it in future cases. The Court did not explain how it weighed the factors against each other or which factors it considered most important. Though it stated that "there are few practical barriers to the running of the writ," it did not identify any such barriers, using its analysis only to point out practical barriers from *Eisentrager* that did not exist at Guantanamo.[29] Though it concluded that "[i]n every practical sense Guantanamo is not abroad," it did not state whether that finding was essential to the extension of the writ.[30]

A nebulous gray area lay between the situations that existed in *Boumediene* and *Eisentrager*. On one end of the spectrum, the writ of habeas corpus could extend outside the sovereign territory of the United States; on the other end, it could not. Into this gray area fell *Maqaleh*.

B. The Test's Application in Maqaleh

In *Maqaleh*, the District Court for the District of Columbia was confronted with the task of applying the *Boumediene* test to determine whether the writ could extend to detainees held at Bagram Airfield, a U.S. military base in Afghanistan.[31] The petitioners were four detainees captured outside Afghanistan and later moved to Bagram.[32] They were designated "enemy combatants" by the United States and held for over six years.[33] Each petitioner had filed a petition for a writ of habeas corpus, and the Government filed motions to dismiss the petitions for lack of jurisdiction.[34] The resolution of these motions was the subject of the

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29. *Id.* at 2262.

30. *Id.* at 2261.

31. *Maqaleh*, 604 F. Supp. 2d at 207.

32. *Id.* at 209. The four petitioners were: Fadi al Maqaleh, a Yemeni citizen captured at an unspecified location outside Afghanistan; Amin al Bakri, a Yemeni citizen captured in Thailand; Redha al-Najar, a Tunisian citizen captured in Pakistan; and Haji Wazir, an Afghan citizen captured in the United Arab Emirates. *Id.*

33. *Id.* Judge Bates quoted the Government's description of the definition of enemy combatants:

> At a minimum, the President's power to detain includes the ability to detain as enemy combatants those individuals who were part of, or supporting, forces engaged in hostilities against the United States or its coalition partners and allies. This includes individuals who were part of or directly supporting Taliban, al-Qaida, or associated forces, that are engaged in hostilities against the United States, its coalition partners or allies. This also includes any persons who have committed a belligerent act or supported hostilities in aid of enemy forces.

Id. at 219.

34. *Id.* at 209-210.

Maqaleh decision, requiring Judge Bates to determine whether his court had jurisdiction to issue the writ of habeas corpus to these petitioners held in Afghanistan.[35]

Noting that the case presented the same constitutional question as *Boumediene*, Judge Bates began by recognizing that his analysis must focus on the "specific framework" fashioned by the *Boumediene* Court.[36] Turning to the three-part *Boumediene* test, he subdivided the three factors, "for the sake of analysis," into six:

> (1) the citizenship of the detainee; (2) the status of the detainee; (3) the adequacy of the process through which the status determination was made; (4) the nature of the site of apprehension; (5) the nature of the site of detention; and (6) the practical obstacles inherent in resolving the petitioner's entitlement to the writ.[37]

Judge Bates also noted a seventh factor that "tacitly informed" the *Boumediene* Court's decision—"the length of a petitioner's detention without adequate review."[38] Applying these seven factors, Judge Bates concluded that: (1) the detainees were not U.S. citizens;[39] (2) the detainees' status as enemy combatants was in dispute;[40] (3) the process through which the detainees' status was determined was inadequate and was even less than the process received by the *Boumediene* petitioners;[41] (4) the detainees were apprehended outside of U.S. territory;[42] (5) the United States exercised slightly less control over Bagram than it did over Guantanamo;[43] (6) the practical obstacles inherent in extending the writ to the detainees were somewhat greater than those that existed for the *Boumediene* petitioners;[44] and (7) the detainees had been held for over six years without adequate review, an unreasonable length of time.[45]

There were no appreciable differences between the *Maqaleh* and *Boumediene* petitioners with respect to the first, second, and sev-

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35. *Id.* at 210.
36. *Maqaleh*, 604 F. Supp. 2d at 214.
37. *Id.* at 215.
38. *Id.* at 216.
39. *Id.* at 218-19.
40. *Id.* at 219.
41. *Maqaleh*, 604 F. Supp. 2d at 226-27.
42. *Id.* at 220-22.
43. *Id.* at 221-26.
44. *Id.* at 227-31.
45. *Id.* at 216-17.

enth factors, the court held.[46] In Judge Bates's estimation, the third factor favored the *Maqaleh* petitioners to a greater degree than it had favored the *Boumediene* petitioners, while the fifth and sixth factors were slightly less favorable. His analysis of the fourth factor—the site of apprehension—was somewhat inconsistent, making it difficult to discern exactly how the factor was ultimately weighed. Balancing these factors, Judge Bates held that three of the four detainees passed the *Boumediene* test and would have access to the writ. In the case of the Haji Wazir, the only detainee who was an Afghan citizen, he held that potential friction with the Afghan government was a practical obstacle that tipped the scale against giving Wazir access to the writ.

II. ANALYSIS

Judge Bates's application of the *Boumediene* test contained many serious errors. On multiple occasions, he failed to take into account important considerations addressed by the *Boumediene* Court, misinterpreted the *Boumediene* Court's analysis, and delved into issues that were not considered in *Boumediene* (and therefore irrelevant to the application of the *Boumediene* test). The errors lay primarily in his application of the site of apprehension, site of detention, and practical obstacles factors.[47] As the following analysis will show, had those factors been properly applied, the opposite result would have been reached, and the writ of habeas corpus would not have been extended to the Bagram detainees.

A. Site of Apprehension

Judge Bates's consideration of the site of apprehension factor was troublingly inconsistent and deviated sharply from the guidance provided by *Boumediene*. Apparently not noticing his self-contradiction, Judge Bates flip-flopped on the weight of the factor twice in the space of two pages, saying first that it cut against the detainees, then that it cut in their favor, and again that it cut against them.[48] He claimed that the factor was unimportant to

46. *Maqaleh*, 604 F. Supp. 2d at 217-18.

47. *See id.* at 220-31. There were no major problems with Judge Bates's application of the citizenship, status, adequacy of process, or length of detention factors. *See id.* at 216-20, 226-27.

48. *See id.* at 220-21. "Here, as in *Boumediene*, all petitioners were captured outside the United States, and hence the site of apprehension 'is a factor that weighs against a

the *Boumediene* Court but asserted that it was more important in *Maqaleh*, even though the situation of the detainees in each case could not be "materially distinguished."[49] He used a rationale never mentioned in *Boumediene*—even though it would have applied with equal force in that case had it been a relevant consideration—and his application of that rationale was absurdly misguided. This inexplicable departure from *Boumediene* represents Judge Bates's most serious error in *Maqaleh*.

The site of apprehension factor was relevant in *Boumediene* for only one reason: the Guantanamo detainees were apprehended outside of the United States, and therefore the factor cut against them.[50] Judge Bates noted as much and stated that the factor cut against the Bagram detainees,[51] but then proceeded on a puzzling course of analysis that had absolutely no basis in *Boumediene* or any other precedent. Though he had up to this point assigned to each factor the same weight he believed the *Boumediene* Court had assigned to it, Judge Bates claimed that "[t]he site of apprehension factor . . . is of more importance here than it was for the Guantanamo detainees in *Boumediene*, and for these petitioners *cuts in their favor* because . . . all were apprehended outside of Afghanistan."[52] Judge Bates's concern was "that the Executive could move detainees physically beyond the reach of the Constitution and detain them indefinitely."[53]

However, the situation Judge Bates was concerned with did not exist in *Maqaleh*. Even though the Bagram detainees had been captured outside of Afghanistan and moved there, the Executive had not moved them "beyond the reach of the Constitution." They had never been within reach of the Constitution in the first place. Judge Bates's concern would perhaps have some merit if the Executive had moved the detainees from locations inside the United States (where the writ was available) to some foreign country in an attempt to take them out of judicial reach. But the Bagram

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finding that they have rights under the Suspension Clause.'" *Id.* at 220 (quoting *Boumediene*, 128 S. Ct. at 2261). "The site of apprehension factor, therefore, is of more importance here than it was for the Guantanamo detainees in *Boumediene*, and for these petitioners, cuts in their favor because . . . all were apprehended outside of Afghanistan." *Id.* at 221. "None [of the detainees] are U.S. citizens or were apprehended in U.S. territory, so these factors cut against them." *Id.*

49. *Id.* at 221.
50. *Boumediene*, 128 S. Ct. at 2260.
51. *Maqaleh*, 604 F. Supp. 2d at 220.
52. *Id.* at 221 (emphasis added).
53. *Id.* at 220.

detainees were *never* in a place where the writ could extend.[54] The Executive simply captured them in one foreign country where the writ could not extend and moved them to another foreign country where the writ could not (until now) extend. Barring an assertion that the Executive has a duty to transport into the United States all enemy combatants captured abroad (an assertion no one made), it cannot be argued that the Executive handled the detainees in a way that deprived them of any rights they would otherwise have had. Thus, Judge Bates's implication that the Executive was squirreling the detainees away to some backwater to avoid having to respect their alleged rights is devoid of merit.[55]

Judge Bates's attempt to employ *Boumediene* to bolster this rationale was similarly misguided, particularly where he quoted the *Boumediene* Court's pronouncement that "[o]ur basic charter cannot be contracted away like this."[56] His use of this blunt assertion is rendered nonsensical by the fact that he took the statement entirely out of context. Properly understood, this statement by the *Boumediene* Court would have no application to Judge Bates's site of apprehension analysis. When considering the effect of territorial sovereignty on the reach of the writ, the *Boumediene* Court noted that, immediately following the Spanish-American War, the United States acquired Cuba from Spain and governed it in trust for the Cuban people.[57] Several years later, the United States transferred sovereignty back to Cuba, but at the same time entered into a lease agreement to maintain control over Guantanamo.[58] The lease provided that, while Cuba would technically retain "ultimate sovereignty" over Guantanamo, the United States would have plenary control.[59] The statement about how the Executive "contracted away" the Constitution referred specifically to this arrangement, where the United States had once had sovereignty over Guantanamo (such that the writ would extend there) and had entered into *a contract* (the lease) whereby de jure sovereignty was handed over but nothing else changed. The *Boumediene* Court criticized the Government's characterization of this ar-

54. *See id.* at 209.

55. *See id.* at 220. Judge Bates's implication of impropriety in the Executive's moving the detainees away from their places of capture to Afghanistan was unaccompanied by any indication that the United States had any means of holding the detainees in their places of capture. *See id.*

56. *Maqaleh*, 604 F. Supp. 2d at 220 (quoting *Boumediene*, 128 S. Ct. at 2259).

57. *Boumediene*, 128 S. Ct. at 2258.

58. *Id.*

59. *Id.*

rangement as part of its rejection of the argument that the reach of the writ depended solely on de jure sovereignty over the site of detention.[60] The statement dealt solely with issues of sovereignty, referenced an actual contract, and had nothing to do with rendition of detainees or the site of apprehension. Thus, Judge Bates's use of the "contracted away" quotation was completely misplaced and seems to have been merely an attempt to grandiosely denounce the Executive's actions.

In the same vein, Judge Bates also commented ominously that "rendition resurrects the same specter of limitless Executive power the Supreme Court sought to guard against in *Boumediene*."[61] Yet, had the *Boumediene* Court been at all concerned about rendition, one might have expected it to at least mention the concept somewhere in its lengthy opinion. What is most striking about the untenable position staked out by Judge Bates was that he reached his conclusion with absolutely no guidance from *Boumediene*. He admitted that the Guantanamo detainees were in the same position as the Bagram detainees: the Guantanamo detainees had all been captured outside of Cuba and "rendered" there, while the Bagram detainees had all been captured outside of Afghanistan and "rendered" there.[62] The *Boumediene* Court, however, never mentioned rendition and certainly never considered it as part of its balancing test analysis. The fact that the Guantanamo detainees had been rendered to Cuba played no role whatsoever in the *Boumediene* Court's consideration of the site of apprehension factor, and thus should have played no role in *Maqaleh*. It is almost incomprehensible that Judge Bates would not only take it upon himself to invent this consideration without guidance from *Boumediene*, but would also state that it favored the Bagram detainees more than the Guantanamo detainees, when the two groups were admittedly in the same position.

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60. *Id.* The *Boumediene* Court stated:

> The necessary implication of the argument is that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint.

Id. at 2258-59.

61. *Maqaleh*, 604 F. Supp. 2d at 220.

62. *Id.* To the extent that *Eisentrager* may also be relevant here, it should be noted that the German detainees in that case had been captured in China, convicted by a military commission in China for engaging in hostile acts against the United States after Germany had surrendered, and repatriated to Germany to serve their sentences. *Eisentrager*, 339 U.S. at 765-66. The fact that they had been moved from China to Germany played no role in the Court's analysis.

Under a proper reading of *Boumediene*, the site of apprehension factor would cut against the Bagram detainees just as it had the Guantanamo detainees simply because they were captured outside of the Unites States. Judge Bates did say this—twice, in fact—but he also declared that the factor cut in the detainees' favor.[63] Though it may be impossible to discern exactly what he held because he repeatedly contradicted himself, it is clear that Judge Bates did not adopt the simple, correct holding that the site of apprehension factor cut against the detainees because they were captured outside the United States. His otherwise pointless deviation from *Boumediene* was undoubtedly an indication that he weighed the factor in favor of the detainees, albeit without any supporting authority. With this shift in weight from *Boumediene* to *Maqaleh*, the factor must be considered a major reason why the Bagram detainees' case was able to make up for the points it would lose on the site of detention and practical obstacles factors. Thus, Judge Bates's unfounded preoccupation with rendition just may have been the thumb on the scale that tipped the final balance to the detainees.

B. Site of Detention

Judge Bates's consideration of the site of detention factor was founded on a fundamental misunderstanding of the *Boumediene* Court's analysis. He stated that, "[w]hereas the site of detention factor in *Boumediene* plainly supported application of the Suspension Clause[64] (and hence habeas rights), it does not favor petitioners to quite the same extent here."[65] However, the *Boumediene* Court did *not* hold that the site of detention favored the Guantanamo detainees. To the contrary, it plainly stated that the factor weighed against extending the writ.[66] Judge Bates's misunderstanding of this point was evident from an earlier statement he made describing the cursory analysis the *Boumediene* Court gave the site of apprehension factor, where he asserted that the *Boumediene* Court simply recognized that the factor weighed against the detainees and "immediately moved on to a different factor—the site of detention."[67] For the *Boumediene* Court, however, the sites of apprehension and detention were lumped together in one

63. *See Maqaleh*, 604 F. Supp. 2d at *220-21*.
64. *See supra* note 2.
65. *Maqaleh*, 604 F. Supp. 2d at 225-26.
66. *Boumediene*, 128 S. Ct. at 2260.
67. *Maqaleh*, 604 F. Supp. 2d at 218.

factor, and its conclusion that that factor cut against the detainees clearly applied to both:

> As to the second factor relevant to this analysis, the detainees are similarly situated to the *Eisentrager* petitioners in that the sites of apprehension *and detention* are technically outside the sovereign territory of the United States. As noted earlier, this is a factor that weighs against finding they have rights under the Suspension Clause.[68]

As is evident from this statement, the site of detention (like the site of apprehension) favors extension only where it is within the sovereign territory of the United States. The *Boumediene* Court struggled mightily throughout the first half of its opinion to discount the Government's strong argument that, historically, territorial sovereignty over the site of detention was the *only* factor in determining the reach of the writ.[69] While it managed to stake out a position in which a lack of territorial sovereignty over the site of detention may not in itself be fatal to the extension of the writ, the *Boumediene* Court certainly never went so far as to assert that a site of detention outside of the sovereign territory of the United States could actually favor extension.

The *Boumediene* Court, after noting that the site of detention factor cut against the detainees, went on to discuss how the United States had much greater control over the site of detention at Guantanamo than it had had in *Eisentrager*.[70] This discussion can only be understood as an attempt to maintain that, though the site of detention may not have favored extension of the writ, it was not fatal to it. That Judge Bates did not understand this basic point indicates that his weighing of this factor was badly skewed. The lesser degree of control the United States had over Bagram (as compared to Guantanamo)[71] did not make a good factor slightly less good—it made an already bad factor worse.

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68. *Boumediene*, 128 S. Ct. at 2260 (emphasis added).

69. *See id.* at 2248-59.

70. *Id.* at 2260.

71. *See Maqaleh*, 604 F. Supp. 2d at 224-26. "United States control and jurisdiction at Bagram is slightly less complete than at Guantanamo." *Id.* at 224. "[A]lthough Bagram does not align squarely with either Landsberg or Guantanamo, this Court cannot conclude that Bagram, like Guantanamo, is 'not abroad.' Whereas the site of detention factor in *Boumediene* plainly supported application of the Suspension Clause (and hence habeas rights) to the Guantanamo detainees, it does not favor petitioners to quite the same extent here." *Id.* at 225-26.

The *Boumediene* Court spent only one paragraph analyzing the site of detention factor.[72] If Judge Bates misread the beginning of that paragraph by not understanding that the *Boumediene* Court held the factor cut against the detainees, he skimmed the end of it, failing to address one of the few things considered by the *Boumediene* Court in its short analysis. In its comparison of Guantanamo with Landsberg Prison, the *Boumediene* Court pointed out that both *Boumediene* and *Eisentrager* were consistent with the *Insular Cases*.[73] The *Insular Cases* were a series of Supreme Court cases involving the application of various constitutional provisions to territories, such as Puerto Rico and Hawaii, acquired by the United States around the turn of the century.[74] The *Boumediene* Court understood the *Insular Cases* to hold that "there was no need to extend full constitutional protections to territories the United States did not intend to govern indefinitely."[75] Because the United States did not plan a long-term occupation of Germany, the *Eisentrager* Court's refusal to extend the writ there was consistent with the *Insular Cases*.[76] So too was the *Boumediene* Court's extension of the writ—the United States had occupied Guantanamo for over 100 years and had no plans to leave, thus making the extension of constitutional protections like habeas corpus necessary.[77] The *Boumediene* Court pointed out this compliance with the *Insular Cases* as part of its analysis of the site of detention factor.[78] Although Judge Bates admitted that, because the United States did not intend to occupy Afghanistan indefinitely, *Maqaleh* was similar to *Eisentrager* and different from *Boumediene*,[79] he did not mention the *Insular Cases*. But the *Insular Cases* were clearly a consideration for the *Boumediene* Court, and *Maqaleh* clearly fell on the *Eisentrager* side of that analysis, such that there would be "no need to extend full constitutional protections" to Afghanistan. Given that the *Boumediene*

72. *Boumediene*, 128 S. Ct. at 2260-61.

73. *Id.*

74. *See* De Lima v. Bidwell, 182 U.S. 1 (1901); Dooley v. United States, 182 U.S. 222 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Hawaii v. Mankichi, 190 U.S. 197 (1903); Dorr v. United States, 195 U.S. 138 (1904)

75. *Boumediene*, 128 S. Ct. at 2260-61. Though the correctness of the *Boumediene* Court's interpretation of the *Insular Cases* is suspect—as Justice Scalia pointed out in his dissenting opinion, *id.* at 2300-01 (Scalia, J., dissenting)—Judge Bates was nevertheless bound by it.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Maqaleh*, 604 F. Supp. 2d at 224-25.

Court only considered a few things in the single paragraph it devoted to the site of detention factor, it was irresponsible for Judge Bates to fail to address the *Insular Cases* issue. More seriously, it was error to decide *Maqaleh* against the *Boumediene* Court's reading of the *Insular Cases*. *Eisentrager* and *Boumediene* were consistent with the *Insular Cases*, but Judge Bates's decision to extend the writ to Afghanistan was not.

C. Practical Obstacles

In its analysis of the practical obstacles factor, the *Boumediene* Court found practical obstacles inherent in the large-scale, dangerous mission American forces faced in *Eisentrager*, indicating that massive responsibilities and potential security threats cut against extension of the writ.[80] A similar situation was presented in *Maqaleh*,[81] but Judge Bates failed to appreciate how closely the practical obstacles in *Maqaleh* resembled those in *Eisentrager*.

The *Boumediene* Court found that practical obstacles were greater in *Eisentrager* in part because the United States had been "responsible for an occupation zone encompassing over 57,000 square miles with a population of 18 million."[82] Judge Bates should have noted that Afghanistan is an occupation zone encompassing about 250,000 square miles with a population over 30 million,[83] making it substantially more unfavorable to the detainees in this respect than the *Eisentrager* situation was. The *Boumediene* Court noted that, in *Eisentrager*, American forces had been charged with "supervising massive reconstruction and aid efforts."[84] Judge Bates should have noted that American forces in Afghanistan have similarly been charged with a massive nation-building mission.[85] The *Boumediene* Court maintained that the

80. *See Boumediene*, 128 S. Ct. at 2261-62.

81. *See Maqaleh*, 604 F. Supp. 2d at 227-31.

82. *Boumediene*, 128 S. Ct. at 2261.

83. *See* U.S. DEPARTMENT OF STATE, BACKGROUND NOTE: AFGHANISTAN (2008), http://www.state.gov/r/pa/ei/bgn/5380.htm (last visited Jan. 13, 2010).

84. *Boumediene*, 128 S. Ct. at 2261.

85. *See* U.S. DEPARTMENT OF DEFENSE, SECURING AFGHANISTAN: STABILIZATION & GROWTH (2007), http://www.defenselink.mil/home/features/2007/Afghanistan/ (last visited Jan. 13, 2010). The Department of Defense described the U.S. mission in Afghanistan:

> In response to the events of September 11, 2001, the U.S. and its allies launched an invasion of Afghanistan to overthrow the Taliban regime and destroy the al-Qaeda terrorist network it supported. In the years since, the International Security Assistance Force, under NATO leadership, has taken charge of extensive provincial reconstruction and stabilization efforts, helping set the economic, political and security conditions for the growth of an effective, democratic national government in Afghanistan. As the lead member of the international coalition, the U.S. contributes troops to

Eisentrager Court was rightly concerned that extension of the writ might constitute "judicial interference with the military's efforts to contain 'enemy elements [and] guerilla fighters . . .'."[86] Though Judge Bates noted that Bagram was "under constant threat by suicide bombers and other violent elements" and was thus closer to *Eisentrager* than *Boumediene*,[87] he did not make the connection made by the *Eisentrager* and *Boumediene* Courts: that extension of the writ in such circumstances was improper judicial interference. Merely pointing out that Bagram was under constant threat of attack and moving on, Judge Bates failed to give adequate consideration to one of the decisive differences between *Eisentrager* and *Boumediene*, a difference which should have prevented the extension of the writ in *Maqaleh*.

The *Boumediene* Court's discussion of the large-scale, difficult mission American forces faced in *Eisentrager* was intended to show that extension of the writ to Guantanamo was proper because American forces there faced no such mission. The *Boumediene* Court pointed out that, in contrast to the *Eisentrager* situation, Guantanamo was "a secure prison facility located on an isolated and heavily fortified military base."[88] Guantanamo consisted of only "45 square miles of land and water" and was occupied entirely by U.S. personnel, the detainees, and "a small number of workers."[89] The *Boumediene* Court's clear implication was that, while American forces in *Eisentrager* were charged with a massive nation-building and security mission and could not be bothered with judicial meddling over the status of a handful of enemy aliens, Guantanamo was a much more manageable piece of real estate—a little place where not much was happening. Thus, the writ could extend there without causing too much trouble. Though Judge Bates correctly pointed out that where *Maqaleh* fell along the *Boumediene-Eisentrager* spectrum was important,[90] he totally failed to consider that the few practical obstacles actually mentioned by the *Boumediene* Court established that *Maqaleh* was squarely on the *Eisentrager* end of that spectrum. As such,

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both the ISAF mission and Operation Enduring Freedom, tasked with pursuing al-Qaeda throughout Afghanistan's inhospitable border region with Pakistan.

Id.

86. *Boumediene*, 128 S. Ct. at 2261 (quoting *Eisentrager*, 339 U.S. at 784).
87. *Maqaleh*, 604 F. Supp. 2d at 228.
88. *Boumediene*, 128 S. Ct. at 2261.
89. *Id.*
90. *Maqaleh*, 604 F. Supp. 2d at 221-22.

those obstacles should have prevented the extension of the writ to Afghanistan.

Judge Bates also failed to give adequate consideration to the *Boumediene* Court's statement that "if the detention center were located in an active theater of war, arguments that issuing the writ would be 'impracticable or anomalous' would have more weight."[91] Not recognizing that this statement was perhaps his best guidepost in the entire *Boumediene* opinion, Judge Bates dismissed it as dictum.[92] It technically was dictum, and dictum is certainly not sufficient to alter precedent to the contrary, but *Boumediene* was the *only* precedent for considering practical obstacles to extending habeas corpus abroad. Because the statement was dictum, and there was no other precedent on point, the issue was one of first impression for Judge Bates. He had the choice to either follow the on-point guidance of the Supreme Court, even though it was dictum, or go the opposite way on his own, with no precedential authority to support his decision. He chose to chart his own course and reached the unprecedented conclusion that the writ could extend to an active war zone. While the *Boumediene* Court's statement was dictum, the fact that Guantanamo was *not* in an active war zone was undoubtedly a significant consideration in its conclusion that practical obstacles would not prevent the extension of the writ. Because the Bagram detainees did not have this consideration in their favor, their argument that practical obstacles should not prevent the extension of the writ was significantly weaker.

Failing to give adequate consideration to the practical obstacles actually discussed by the *Boumediene* Court, Judge Bates nevertheless took it upon himself to discuss issues that played no role in the *Boumediene* Court's practical obstacles analysis. In his analysis of the practical obstacles factor, Judge Bates inexplicably brought up considerations that were relevant only to other factors. He stated, without supporting authority, that "United States control over the detention facility is also relevant" to the practical obstacles factor.[93] However, under a proper reading of *Boumediene*, control over the detention facility is part of the site of deten-

91. *Boumediene*, 128 S. Ct. at 2261-62.

92. *Maqaleh*, 604 F. Supp. 2d at 230. Obiter dictum is defined as "[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)." BLACK'S LAW DICTIONARY 1177 (9th ed. 2009).

93. *Maqaleh*, 604 F. Supp. 2d at 228.

tion factor. The only manner in which control over the detention facility could be considered even remotely relevant to the practical obstacles factor would be to note the *Boumediene* Court's reasoning that, while American forces in *Eisentrager* faced a threat of attack, Guantanamo was isolated and secure.[94] Because Judge Bates had already conceded that Bagram was under threat of attack and was thus aligned with *Eisentrager* in this regard, his unsupported tangent would seem only to cut against the detainees.

However, Judge Bates's reason for finding that control over the detention facility was relevant to the practical obstacles factor had nothing to do with the threat of attack considered by the *Boumediene* Court, but involved consideration of yet another issue never discussed in *Boumediene*. Judge Bates asserted that control over the detention facility meant that the United States was capable of setting up tribunals, apparently indicating that it was not impractical to extend the writ there.[95] This line of reasoning, aside from being wholly unsupported by *Boumediene*, was fraught with misconception. First, though extensive control over a facility may, as Judge Bates pointed out, allow for tribunals to be set up *at that facility*, the habeas corpus proceedings sought by the Bagram detainees would take place not at Bagram, but in courts in the United States. Thus, the practical capability to set up a tribunal at Bagram was irrelevant.[96] Next, Judge Bates failed to recognize that such a consideration did not save the *Eisentrager* detainees. He noted that the United States was able to provide the *Eisentrager* detainees with a "rigorous adversarial process" at a "hastily-constituted military tribunal in post-war China,"[97] but did not realize that the practical capability to set up a tribunal had not prevented the *Eisentrager* Court from denying the extension of the writ. Thus, Judge Bates's use of *Eisentrager* to bolster his point was misguided. His analysis of these issues might be relevant if aimed at the adequacy of process factor, as the ability to set up tribunals at Bagram could make the inadequate process provided there less forgivable, but it had no place in the practical obstacles factor. That Judge Bates discussed it there revealed that he ei-

94. *Boumediene*, 128 S. Ct. at 2261.

95. *Maqaleh*, 604 F. Supp. 2d at 228.

96. Judge Bates would later point out that video-conferencing technology would allow Bagram detainees to be "present" at habeas proceedings in courts in the United States (another factor never considered by the *Boumediene* Court in its practical obstacles analysis), but the relevance of a practical capability to set up a tribunal at Bagram was never explained. *Id.* at 228-29.

97. *Id.* at 228.

ther did not understand the practical obstacles factor or was grasping at straws for some semblance of an argument to prevent that factor from killing the detainees' claims. Either way, he was wrong.

In his analysis of the practical obstacles factor, Judge Bates's unfounded and irrational obsession with rendition once again reared its ugly head. Attempting to rebut the Government's argument that habeas corpus proceedings might require witnesses to be called away from vital duties, Judge Bates noted that because the Bagram detainees were captured outside of Afghanistan and transported there, there was no reason to believe that relevant witnesses would be located in the Afghan theater of war.[98] While this point may or may not be valid,[99] it played no role in *Boumediene*. The *Boumediene* Court never mentioned the availability of witnesses in its consideration of the practical obstacles factor. Moreover, Judge Bates's reasoning would seem to apply equally to *Eisentrager*, but it did not persuade the *Eisentrager* Court to extend the writ. Because the *Eisentrager* detainees were captured in China and transported to Germany,[100] there would be no reason to believe that relevant witnesses would be located in Germany and have to be called away from vital duties there to testify in courts in the United States. That the *Eisentrager* and *Boumediene* detainees were captured elsewhere and rendered to their place of detention was simply irrelevant in both cases. Judge Bates's repeated attempts to give meaning to the fact that the Bagram detainees were captured outside of Afghanistan is extremely troubling, as it surely affected his weighing of the factors in a manner totally unsupported by precedent.

Overall, Judge Bates's analysis of the practical obstacles factor was dismissive and evasive. Rather than squarely confronting the practical obstacles discussed by the *Boumediene* Court and recognizing that *Maqaleh*'s close parallels with *Eisentrager* were sig-

98. *Id.*

99. Regardless of where the Bagram detainees were captured, one must assume that they were captured by people whose job it is to hunt down and capture suspected terrorists. Judge Bates thought it important that these people, not operating in Afghanistan, would not have to be called away from a vital mission in that country to testify in habeas corpus proceedings. However, the fact that the Bagram detainees were captured outside of Afghanistan indicates the vital mission of hunting down and capturing terrorists is not confined to Afghanistan. Wherever our terrorist-hunters are operating, asking them to testify in habeas corpus proceedings would disrupt their work. Judge Bates's concern with whether witnesses were located inside or outside of Afghanistan ignores the transnational nature of the struggle against terrorism. The practical obstacles involved know no borders.

100. *Eisentrager*, 339 U.S. at 765-66.

nificant, he ignored or downplayed much of what the *Boumediene* Court said, choosing instead to discuss considerations that played no part in the *Boumediene* Court's practical obstacles analysis. Though he admitted that the factor was more favorable to the *Boumediene* detainees than the *Maqaleh* detainees,[101] Judge Bates cunningly avoided reaching the conclusion that should have been dictated by a fair reading of *Boumediene*: the practical obstacles present in *Maqaleh*, virtually identical to those present in *Eisentrager*, should have killed the detainees' claims.[102]

III. CONCLUSION

While much of the blame for *Maqaleh* should be directed at Judge Bates, ultimate responsibility lies with the *Boumediene* Court. Its failure to properly explain how to apply and weigh the factors of the test it invented provided the lower courts with little guidance. Only about three of the nearly forty pages in the majority opinion were devoted to the test.[103] Even with so little to go by, it is not difficult to point out a host of mistakes Judge Bates made in applying *Boumediene*. Generally, his opinion represents judicial discretion gone wild. However, had the *Boumediene* Court been more forthcoming, *Maqaleh* would never have happened. Its poorly-reasoned, poorly-explained decision to extend the writ to aliens detained outside the sovereign territory of the United States opened the door to an unprecedented and potentially

101. *Maqaleh*, 604 F. Supp. 2d at 230. Judge Bates stated: "[T]he Court recognizes that the path to providing habeas review to these petitioners is likely strewn with more practical obstacles than was the case for the detainees at Guantanamo." *Id.*

102. Judge Bates ultimately extended the writ to only three of the four petitioners, denying the claim of Haji Wazir, the only petitioner who was an Afghan citizen. *Id.* at 231. Because Wazir was an Afghan citizen, Judge Bates stated, it was "possible—if not likely—that review of Wazir's habeas petition by this Court could cause friction with the Afghan government." *Id.* at 230. This "possibility of friction," he held, "constitut[ed] a significant practical obstacle to habeas review." *Id.* at 231. While it is tempting to look favorably upon Judge Bates's refusal to extend the writ to Wazir because it shows that he is willing to recognize at least some limitation on his own power, his rationale exposes a perverse view of which interests are worth protecting. Though he adopted the *Boumediene* Court's statement about the need to defer to the Executive in military matters during wartime, *id.* at 208 (quoting *Boumediene*, 128 S. Ct. at 2277), the only practical obstacle that Judge Bates gave any credence was the one that touches the interests of a *foreign* government. While Judge Bates ran roughshod over the Government's arguments that the military mission of the United States would be jeopardized by his extension of the writ, he kowtowed to the hypothetical possibility that a foreign government might be displeased. In light of his readiness to defer to the Afghan government wherever friction is "possible" but admittedly "not likely," Judge Bates's steadfast refusal to defer to our own Executive during wartime—despite his lip service to the contrary—is even more appalling.

103. *Boumediene*, 128 S. Ct. at 2259-62.

boundless expansion of habeas corpus jurisdiction. Eschewing time-tested, bright-line rules for a nebulous, wishy-washy balancing test, the *Boumediene* Court no doubt thought it was embracing nuance and complexity. But what it was really doing was destroying predictability and giving federal judges a far too expansive discretion to decide sensitive national security questions.

On June 1, 2009, the *Maqaleh* decision was certified for interlocutory appeal to the United States Court of Appeals for the District of Columbia Circuit.[104] The D.C. Circuit should reverse Judge Bates's decision and overrule his clumsy expansion of *Boumediene*. *Boumediene* itself was a striking example of judicial overreaching. Any decision to reach even farther and expand *Boumediene* should, at the very least, be left to the Supreme Court.

James Thornburg

104. Al Maqaleh v. Gates, 620 F. Supp. 2d 51 (2009) (granting motion to certify for appeal).